

APPEAL NO. 060390
FILED APRIL 12, 2006

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 1, 2005, with the record closing on January 31, 2006. The hearing officer resolved the disputed issues by deciding that: (1) the appellant/cross-respondent (claimant) did sustain a compensable injury on ____; (2) that the claimant had disability from October 6, 2002, through May 11, 2004; (3) that the respondent/cross-appellant (carrier) is not relieved of liability under Section 409.002 because of the claimant's failure to timely notify his employer pursuant to Section 409.001; and (4) that the carrier is relieved from liability under Section 409.004 because of the claimant's failure to file a claim for compensation with the Texas Department of Insurance, Division of Workers' Compensation (Division) within one year of the injury as required by Section 409.003. Both parties have appealed. The claimant appealed, disputing the determination that the carrier is relieved from liability because of claimant's failure to file a claim within one year of the injury. The carrier responded, urging affirmance of the timely filing determination disputed by the claimant. The carrier additionally appealed the injury, disability, and timely notice to employer determinations. The appeal file does not contain a response from the claimant to the carrier's cross-appeal.

DECISION

Affirmed in part and reversed and rendered in part.

We note that although listed as a disputed issue in the hearing officer's decision and order, the record reflects that the parties agreed to withdraw the issue of average weekly wage. No findings of fact or conclusions of law were made on this issue. The hearing officer did make findings of fact and conclusions of law on the issue of whether the claimant sustained disability as a result of the claimed injury of ____, although it was not listed as a disputed issue in the hearing officer's decision and order. However, review of the record reflects that disability was in fact a disputed issue and was litigated at the CCH. The claimant contends in his appeal that "the carrier did not dispute [the claimant's] claim as required by Section 409.022 and [28 TEX. ADMIN. CODE § 124.3 (Rule 124.3)]." We note that carrier waiver was not an issue at the CCH and will not be considered for the first time on appeal.

The claimant testified that he injured his back on ____, when he slipped while pushing a car backwards while performing his job duties and that he reported the incident that same day to his supervisor. It is undisputed that the claimant did not file his claim within one year from the date of his injury.

COMPENSABLE INJURY AND DISABILITY

The claimant had the burden to prove that he sustained a compensable injury and that he had disability as defined by Section 401.011(16). Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). There was conflicting evidence on these issues. Those issues presented a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). The hearing officer resolves the conflicts and inconsistencies in the evidence and decides what facts the evidence has established. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). After reviewing the record, we find sufficient evidence to support the compensable injury and disability determinations.

TIMELY NOTIFICATION

The 1989 Act generally requires that an injured employee or person acting on the employee's behalf notify the employee's employer of the injury no later than 30 days after the injury occurred. Section 409.001. The burden is on the claimant to prove the existence of notice of injury. Travelers Insurance Company v. Miller, 390 S.W.2d 284 (Tex. Civ. App.-El Paso 1965, no writ). In the present case, there was conflicting evidence as to whether or not the claimant gave timely notice of a ____, injury to his employer. It was within the province of the hearing officer to resolve the conflicting evidence. There is sufficient evidence to support the hearing officer's timely notice determination.

TIMELY FILING OF CLAIM

Section 409.004 provides that failure to file a claim for compensation with the Division as required by Section 409.003 (not later than one year after the date of injury) relieves the employer and the carrier of liability unless good cause exists for failure to timely file a claim or the employer or the carrier does not contest the claim. Whether good cause exists is a matter left up to the discretion of the hearing officer, and the determination will not be set aside unless the hearing officer acted without reference to any guiding rules or principles. Appeals Panel Decision (APD) 002816, decided January 17, 2001, citing Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). We have held that the appropriate test for the existence of good cause is whether the claimant acted as a reasonably prudent person would have acted under the same or similar circumstances. APD 94244, decided April 15, 1994. The claimant at one point testified that he did not believe that his employer provided workers' compensation insurance coverage. The hearing officer found that the claimant did not file a claim for compensation with the Division within one year of the date of the claimed injury as required by Section 409.003 but did not make a specific finding regarding good cause. However, for reasons discussed below it is not necessary to remand this case back to her to do so.

TOLLING STATUTE

Section 409.008 provides that if an employer or the employer's insurance carrier has been given notice or has knowledge of an injury to an employee and the employer or insurance carrier fails, neglects, or refuses to file the report under Section 409.005 (Employer's First Report of Injury or Illness (TWCC-1)), the period for filing a claim for compensation under Section 409.003 does not begin to run against the claim of an injured employee until the day on which the report required under Section 409.005 has been furnished. Section 409.005(a) provides that an employer shall file a written report with the Division and the employer's insurance carrier if: (1) an injury results in the absence of an employee of that employer from work for more than one day; or (2) an employee of the employer notifies that employer of an occupational disease under Section 409.001. There was no evidence in the record that the employer filed a report as required under Section 409.005. We have affirmed both the timely notice to employer and disability determinations made by the hearing officer. Therefore, the employer's or insurance carrier's duty to file such report as required by Section 409.005 was triggered. There is no evidence that the required report was furnished, consequently, the tolling statute applies. The hearing officer's determination that the carrier is relieved from liability under Section 409.004 because of the claimant's failure to file a claim for compensation with the Division within one year of the injury as required by Section 409.003 is reversed and a new determination rendered that the requirement to file a claim has been tolled pursuant to Section 409.008 and the carrier is not relieved from liability under Section 409.004 because of the claimant's failure to file a claim for compensation with the Division within one year of the injury as required by Section 409.003.

The true corporate name of the insurance carrier is **FIRE & CASUALTY INSURANCE COMPANY OF CONNECTICUT** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge